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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ROCHELLE LEVY, Plaintiff and Appellant, v. AMERICAN FILM INSTITUTE, Defendant and Respondent.	B204207 (Los Angeles County Super. Ct. No. BC354409)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rolf M. Treu, Judge. Affirmed in part, reversed in part and remanded with directions.

Landegger, Baron & Lavenant, Larry C. Baron and Christopher L. Moriarty for Plaintiff and Appellant.

Van Vleck Turner & Zaller, Brian F. Van Vleck and Daniel J. Turner for Defendant and Respondent.

Rochelle Levy appeals from the judgment entered after the trial court granted summary judgment in favor of her former employer, American Film Institute (AFI),[1] in her action alleging retaliatory discharge and wage and hour violations. Levy contends triable issues of material fact exist as to whether AFI terminated her employment in retaliation for her testimony in a separate case by a coworker brought under California's Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940 et seq.). Levy also contends triable issues of material fact permeate her wage and hour claims. We agree a triable issue of material fact exists as to whether Levy was properly classified as an administratively exempt employee. Accordingly, we reverse the judgment and direct the trial court to grant in part and deny in part AFI's alternative motion for summary adjudication.

FACTUAL AND PROCEDURAL HISTORY

1. *Levy's Employment with AFI*

Levy began working at AFI in February 1999 as an assistant/consultant. She was promoted in July 1999 to the position of senior writer and again in July 2000 to the position of editorial director. As editorial director Levy edited AFI's publications, including its tribute book for its lifetime achievement award and its annual reports. In this capacity, Levy worked in close collaboration with AFI's director of creative services, Patti Johnson, who was responsible for the artistic design and layout of AFI publications. Johnson was also responsible for ensuring AFI's publications were timely delivered to the printer. According to Jean Firstenberg, AFI's chief executive officer and Levy's initial supervisor, coordination between Johnson and Levy was essential to ensuring successful production of AFI's written publications. Throughout her tenure at AFI, Levy was an at-will employee.

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[1] AFI is an independent nonprofit organization established in 1967 as part of the National Foundation on the Arts and Humanities Act (see 20 U.S.C. § 951 et seq.). According to its mission statement, AFI's objective is to provide leadership in screen education and recognize and celebrate excellence in the art of film, television and digital media.

2. *Levy's Conflicts with Johnson*

In 2003 Levy began complaining to Firstenberg about Johnson's abilities. Levy found Johnson unprofessional, lazy and careless with her work. Levy believed Johnson made errors in AFI publications that cost AFI money and reflected badly on the editorial team. Although Firstenberg agreed Johnson had made some mistakes, she did not share Levy's negative assessment of Johnson.

In October 2004 Firstenberg hired Jonathan Estrin as AFI's executive vice president to manage the organization's day-to-day operations, including supervising Levy and other employees. When Estrin was hired, Levy shared with him, at his request, her low opinion of Johnson's capabilities.

3. *Levy's Deposition Testimony in a Former Employee's FEHA Lawsuit*

On June 27, 2005 Levy was served with a third-party witness deposition subpoena in a wrongful discharge and wage and hour lawsuit filed by former AFI employee Sterling Davis against AFI (Los Angeles Superior Court No. BC327298) (the "*Davis* case"). The case included claims of race discrimination by AFI in violation of FEHA. The deposition, initially scheduled for July 2005, was continued to August 18, 2005. During her August 18, 2005 deposition, Levy was critical of Johnson's skills as an artistic director, reiterating her belief that Johnson was careless and incompetent.

4. *Levy's Refusal to Report to Johnson*

In July 2005, before Levy's deposition in the *Davis* case, Estrin informed Levy he intended to implement an administrative restructuring plan but "had not worked out the details yet." On August 11, 2005 Estrin told Levy that under his new restructuring plan she would report administratively to Johnson: Levy would submit her bi-weekly reports to Johnson instead of to him and attend creative services meetings with Johnson.

Levy complained to the human resources department about Estrin's restructuring plan, stating, "After years of my complaining about [Johnson's] performance, the company now sees fit to make her my supervisor. Since her performance does not merit this elevation, I am convinced I am being discriminated against on the basis of my age in relation to [Johnson's] age."

Levy refused to comply with Estrin's restructuring plan, continuing to submit her bi-weekly reports to Estrin instead of to Johnson and refusing to attend meetings with Johnson. Levy's refusal to adhere to Estrin's directive caused problems for AFI. Johnson complained to Estrin, "It's really hard for me to do my job and integrate editorial into our daily operation when there is no communication or response from [Levy] to any of my e-mails or phone calls."

In October 2005 Roschoune Franklin, AFI's human resources director, told Levy she had investigated her complaint of discrimination and concluded Estrin's directive that she submit her reports to Johnson was part of AFI's efforts to increase its efficiency.

5. *AFI's Termination of Levy's Employment*

On November 21, 2005 Estrin advised Levy she would be terminated if she continued to refuse to comply with the job duties he had assigned to her, including the submission of her bi-weekly reports to Johnson and her attendance at creative service meetings. On November 22, 2005 Levy responded by informing AFI she had been misclassified as an exempt employee under state law and claimed overtime payments had been improperly withheld in violation of various provisions of the Labor Code. On November 23, 2005 Levy also filed a complaint with the California Department of Fair Employment and Housing (DFEH) claiming AFI was retaliating against her for providing adverse deposition testimony in the *Davis* case and for claiming she has been misclassified as an exempt employee. AFI terminated Levy's employment in December 2005.

6. *Levy's Lawsuit against AFI*

In June 2006 Levy filed this lawsuit against AFI, asserting claims for wrongful termination in violation of public policy; failure to pay all wages and overtime due; failure to provide accurate itemized statements of wages and deductions; failure to provide meal and rest periods; breach of an implied-in-fact employment contract; and unfair competition.

7. *AFI's Motion for Summary Judgment or, in the Alternative, Summary Adjudication*

On March 2, 2007 AFI filed a motion for summary judgment or, in the alternative, summary adjudication. AFI argued it had a legitimate business reason for terminating Levy's employment, namely, her violation of Estrin's orders and refusal to report administratively to Johnson. In his declaration accompanying AFI's motion, Estrin explained he had wanted Levy to report to Johnson to eliminate confusion over individual responsibilities and provide one consolidated point of contact on administrative publication issues. Johnson was the logical person to fulfill this role because she was the point person for putting the publication together and ensuring the timely physical delivery of AFI publications to the printer. Estrin also denied his motive for terminating Levy's employment was retaliatory: He had not been employed by AFI when Davis had worked there, had no knowledge of the substance of Levy's deposition testimony in that case and no concern about it. Estrin fired Levy because she flagrantly violated his managerial authority by refusing to report to Johnson.

As for the remaining causes of action, AFI argued Levy's second cause of action for unpaid overtime, her third cause of action for failure to provide accurate itemized wage statements and her fourth cause of action for failure to provide meal and rest periods also failed as a matter of law because Levy was properly classified as an administrative employee who was exempt from overtime wage and hour requirements under California law. AFI also asserted Levy's fourth cause of action failed as a matter of law for the additional reason that AFI did not prohibit her from taking meal and rest breaks at her discretion. Finally, because Levy could not establish a violation of any labor laws, AFI argued, her claim for unfair practices under Business and Professions Code section 17200 also failed.

8. *Levy's First Amended Complaint and Opposition to the Motion for Summary Judgment or, in the Alternative, Summary Adjudication*

a. *The first amended complaint*

On March 26, 2007, before her opposition to AFI's motion was due, Levy filed a motion for leave to file a first amended complaint that included two new causes of action:

The eighth cause of action alleged AFI's failure to pay wages pursuant to a retroactive salary increase; the ninth cause of action alleged negligent supervision and negligent retention of Johnson. The court permitted Levy to file the amended complaint and allowed AFI to file a supplemental summary judgment motion directed solely to the new causes of action.

b. *Levy's opposition to AFI's motion*

On May 4, 2007 Levy filed her opposition to AFI's motion, arguing triable issues of material fact existed with respect to each of her causes of action. In her declaration accompanying the opposition, Levy explained she had received exemplary performance reviews throughout her tenure at AFI. Then, on August 11, 2005, one week before her deposition in the *Davis* case, Estrin informed Levy he had decided to make Johnson her supervisor, even though Estrin knew Levy's low opinion of Johnson. Levy argued Estrin's articulated reasons for requiring her to report to Johnson were pretextual and AFI, in fact, had attempted to intimidate her into giving favorable testimony and then retaliated against her for giving critical testimony of Johnson and Firstenberg in the *Davis* case. Levy also argued triable issues of material fact existed as to whether she was properly classified as an administratively exempt employee not subject to California's wage and hour provisions.

c. *AFI's supplemental motion*

On May 14, 2007 AFI filed a supplement to its motion for summary judgment directed to Levy's new causes of action, including the eighth cause of action seeking wages in connection with a retroactive salary increase. In her eighth cause of action Levy alleged she was awarded a 3.5 percent merit salary increase in July 2005 and another 3.5 percent increase in October 2005 that was intended to be retroactive to July 2005, but she never received the second merit increase. In its supplemental motion directed to this claim, AFI contended Levy was not entitled to the second 2005 merit increase. Patty Smith, assistant to Franklin in the human resources department, and Tanya Quan, AFI's payroll coordinator, explained in their accompanying declarations that each AFI employee was eligible to receive one annual merit increase per year. In July 2005 Estrin

had recommended a "standard" 3.5 percent merit increase for Levy and that increase was processed. Another "payroll advise form" was filled out in October 2005 in response to a concern that Levy had not received her 3.5 percent merit increase, but that form was not processed because a review of electronic records showed Levy had received her 3.5 percent increase. AFI never intended to provide Levy with a 7 percent merit increase in salary in 2005.

In her opposition to this supplemental motion filed May 24, 2007, Levy declared that, notwithstanding AFI's claim of clerical error discovered in October 2005, as late as May 2006 AFI had informed one of Levy's prospective employers that her ending salary was $63,848.23, an amount that necessarily included a 7 percent increase in 2005.

The trial court granted summary judgment in favor of AFI. Levy filed a timely notice of appeal from the judgment.

CONTENTIONS

Levy contends the trial court erred in granting AFI summary judgment because triable issues of material fact exist as to whether AFI's purported legitimate business reason for discharging her was a pretext for retaliatory discharge. She also contends triable issues of material fact exist as to whether she was an administrative employee exempt from California's wage and hour regulations governing overtime pay, meal and rest periods and itemized wage statements and whether she was entitled to additional wages based on an October 2005 merit pay increase.[2]

DISCUSSION

1. *Standard of Review*

We review the trial court's grant of summary judgment de novo and decide independently whether the parties have met their respective burdens and whether facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348; *Guz v. Bechtel National, Inc.*

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2 Levy has expressly abandoned in this appeal any arguments relating to her claims for breach of an implied-in-fact contract and negligent retention and supervision of Johnson.

(2000) 24 Cal.4th 317, 334 (*Guz*); Code Civ. Proc., § 437c, subd. (c).) "We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037 (*Yanowitz*).)

2. *The Trial Court Properly Granted AFI's Motion as to Levy's Cause of Action for Wrongful Discharge*

a. *Governing law on wrongful termination in violation of FEHA's prohibitions*

The cause of action for wrongful termination in violation of public policy is an exception to the general rule that an employer has an unfettered right to terminate an at-will employee: Although an employer has the right to terminate at-will employees for any or no reason, even an arbitrary or irrational reason, the employer does not have the right to terminate an employee in violation of a substantial and fundamental public policy. (*Guz, supra*, 24 Cal.4th at p. 335; *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889-890; *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 169-170.) To support a claim for wrongful termination in violation of public policy, the policy allegedly violated must be articulated, at the time of the discharge, in a constitutional or statutory provision. This requirement ensures, among other things, the employer has adequate notice of the conduct that will subject it to liability. (*Stevenson*, at pp. 889-890; *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 79.)

Levy contends her discharge by AFI violated the public policy set forth in Government Code section 12940, subdivision (h), the FEHA provision prohibiting employers from discharging, expelling or otherwise discriminating against an employee on the ground the employee "opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part." (See *Rojo v. Kliger* (1990) 52 Cal.3d 65, 90-91 [cause of action for wrongful discharge in violation of public policy may be based on employer's actions that violate FEHA].)

"'"'"To establish a prima facie case of retaliation, a plaintiff must show that she engaged in protected activity, that she was thereafter subjected to an adverse employment action by her employer, and there was a causal link between the two.'"'"' (*Soukup v. Law*

Offices of Herbert Hafif (2006) 39 Cal.4th 260, 287-288; see *Yanowitz, supra,* 36 Cal.4th at p. 1042 [plaintiff establishes a prima facie case for retaliation under FEHA by showing he or she engaged in a protected activity, the employee suffered an adverse employment action and a causal link exists between the protected activity and the employer's action].) Once an employee establishes a prima facie case, the burden shifts to the employer to offer a legitimate, nonretaliatory reason for the adverse employment action. (*Yanowitz,* at p. 1042) [adopting the burden-shifting analysis of *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802-805 [93 S.Ct. 1817, 36 L.Ed.2d 668] in retaliation cases].) If the employer produces a legitimate business reason for the adverse employment action, "the presumption of retaliation ' " 'drops out of the picture,'"' and the burden shifts back to the employee to prove intentional retaliation." (*Yanowitz,* at p. 1042*;* see also *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1004.)

The plaintiff meets this burden on summary judgment only by producing "'substantial responsible evidence'" that the employer's showing was untrue or pretextual. (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1735, *Slatkin v. University of Redlands* (2001) 88 Cal.App.4th 1147, 1156; see also *Guz, supra,* 24 Cal.4th at p. 357.) "[A]n employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory." (*Guz,* at p. 361.)

b. *The trial court properly concluded Levy could not establish her discharge was motivated by unlawful retaliation*

In her complaint Levy alleged a campaign of retaliation that began immediately following her testimony in the *Davis* case and culminated with her termination in December 2005. Levy contends she established her prima facie case for wrongful discharge/retaliation by supplying evidence she engaged in various protected activities—giving testimony in the *Davis* case in August 2005, complaining to AFI about wage and hour violations in November 2005 and filing a DFEH claim the same month—and that her termination soon followed. (See, e.g., *McRae v. Department of Corrections and*

Rehabilitation (2006) 142 Cal.App.4th 377, 388 (*McRae*) [plaintiff can establish a prima facie case of retaliation "by producing evidence of nothing more than the employer's knowledge that the employee engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision"]; *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 69.)

The trial court did not rule Levy was unable to prove a prima facie case of retaliation as a basis for her claim of wrongful discharge. Rather, even if she could satisfy her initial burden, the court concluded Levy had not presented "substantial responsive evidence" that would allow a trier of fact to find, more likely than not, that AFI's proffered reason for discharging her was pretext for retaliation. Indeed, neither in her opposition to the motion nor on appeal has Levy advanced substantial evidence to support her claim AFI's articulated reasons for terminating Levy were pretext for retaliation.

Levy insists the temporal proximity between her deposition in the *Davis* case and her termination shows retaliatory motive. The proffered causal link is somewhat questionable since Estrin's decision to have Levy report to Johnson preceded Levy's testimony in the *Davis* case. (Levy does suggest AFI was attempting to intimidate her prior to her testimony.) Even accepting the significance of the testimony as a critical event, however, timing alone, while sufficient to establish a prima facie case, is not sufficient evidence of pretext to preclude summary judgment. (See, e.g., *Loggins v. Kaiser Permanente Intern.* (2007) 151 Cal.App.4th 1102, 1112-1113 [evidence of temporal proximity between the protected action and the allegedly retaliatory employment decision "'*only satisfies* the plaintiff's initial burden'" of proving a prima facie case of retaliation; once employer proffers legitimate, nonretaliatory reason for the adverse employment action, the presumption of retaliation is eviscerated and the burden is the employee's to show intentional discrimination]; *McRae, supra,* 142 Cal.App.4th at p. 388 [same]; see also *Yanowitz, supra,* 36 Cal.4th at p. 1042 [once employer produces legitimate reason for adverse employment decision, presumption of retaliation """"drops

out of the picture,’’’’ and burden shifts back to employee to prove intentional retaliation”].)

The undisputed evidence, on the other hand, established Levy was resistant to Estrin’s efforts to make administrative changes and created problems that justified AFI’s strong reaction. She flatly refused to submit her reports to Johnson as Estrin had directed and refused to attend meetings he believed necessary. Levy was told that continued violations of Estrin’s directive would result in her termination.

That Levy responded to this threat of termination by making wage and hour complaints and filing a DFEH complaint in no way vitiates AFI’s evidence that Levy’s termination was based on a legitimate, nonretaliatory business decision. Although the filing of such administrative complaints is an activity protected under FEHA (see *Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 818), Levy made both complaints only after Estrin threatened to terminate her unless she complied with his directives, undermining her assertion the filing of the complaints motivated her termination. (See, e.g., *Clark County School District v. Breeden* (2001) 532 U.S. 268, 273 [121 S.Ct. 1508, 149 L.Ed.2d 509] [plaintiff’s filing of administrative complaint with Equal Employment Opportunity Commission could not serve as sufficient evidence of retaliation case when complaint was made after adverse employment action was communicated to her by employer].) As Justice Sills observed in *Chen v. County of Orange* (2002) 96 Cal.App.4th 926, 948, the job protection afforded to employees who file a DFEH claim was never intended to protect “employees whose complaint is generated merely to manipulate the system.” (See *ibid.* [“Ax about to fall? Never fear: file a discrimination claim, no matter how meritless. Your employer will be afraid to take any action because now you can sue for retaliation.”].)

Levy cites evidence she had received numerous accolades throughout her tenure at AFI to suggest the only motive for her termination must have been retaliation. There is little question that Levy was a skilled and valued employee who was displeased by having to report to Johnson, a colleague whose abilities she plainly did not respect. That alone, however, does not support a retaliation claim. (See *Villanueva v. City of Colton*

(2008) 160 Cal.App.4th 1188, 1195 [employer's decision may be "'"wrong, mistaken, or unwise"'" but it does not follow the decision is pretext for unlawful discrimination or retaliation]; see also *McRae, supra,* 142 Cal.App.4th at p. 387 ["'"Workplaces are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action." [Citation.] If every minor change in working conditions or trivial action were materially adverse "action then any action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit." [Citation.]'"].)[3]

4. *The Trial Court Erred in Granting Summary Judgment on Levy's Second and Third Causes of Action Because Triable Issues of Material Fact Exist Concerning Whether Levy Was Properly Classified as an Exempt Administrative Employee*

a. *Governing law on overtime pay in California*

Labor Code section 510, subdivision (a), provides in part, "Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek . . . shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee." However, "[t]he Industrial Welfare Commission may establish

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3 As support for her pretext argument, Levy cites Estrin's e-mail insisting she comply with her new "written job description" and evidence no newly revised job description existed. This evidence is simply too thin a reed to support her retaliation claim. Whether or not there was a formal job description, the evidence is undisputed Estrin had asked her to submit her reports to Johnson and Levy refused. Moreover, although she does not allege it directly, the change in reporting structure (rather than the termination) was not itself an "adverse employment action" that can support Levy's retaliation allegation. (See *Yanowitz, supra,* 36 Cal.4th at p. 1054 [adverse employment action must be reasonably likely to impair employee's job performance or prospects for advancement; "[m]inor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment"]; see also *Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1455 ["[a] change that is merely contrary to the employee's interests or not to the employee's liking is insufficient" to constitute adverse employment action].)

exemptions" from this requirement for "executive, administrative and professional employees, provided that the employee is primarily engaged in the duties that meet the test of the exemption, customarily and regularly exercises discretion and independent judgment in performing those duties, and earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment." (Lab. Code, § 515, subd. (a).)

Pursuant to the authority granted by to it to establish exemptions to the overtime pay provisions in the Labor Code, the Industrial Welfare Commission (IWC) issued wage order No. 4-2001, applicable to professional, technical, clerical and other similar occupations. Codified in title 8, section 11040 of the California Code of Regulations, Wage Order No. 4-2001 essentially "provides a five-part test to determine whether the administrative employee exemption applies.[4] The employee must (1) perform 'office or

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4 Wage Order 4-2001 provides, "A person employed in an administrative capacity means any employee: [¶] (a) Whose duties and responsibilities involve either: [¶] (I) The performance of office or non-manual work directly related to management policies or general business operations of his/her employer or his employer's customers; or [¶] (II) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and [¶] (b) Who customarily and regularly exercises discretion and independent judgment; and [¶] (c) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined for purposes of this section); or [¶] (d) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge; or [¶] (e) Who executes under only general supervision special assignments and tasks; and [¶] (f) Who is primarily engaged in duties that meet the test of the exemption. The activities constituting exempt work and non-exempt work shall be construed in the same manner as such terms are construed in the following regulations under the Fair Labor Standards Act effective as of the date of this order: 29 C.F.R. Sections 541.201-205, 541.207-208, 541.210, and 541.215. Exempt work shall include, for example, all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions. The work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee satisfies this requirement. [¶] (g) Such employee must also earn a monthly

non-manual work directly related to management policies or general business operations' of the employer or its customers, (2) 'customarily and regularly exercise[] discretion and independent judgment,' (3) 'perform[] under only general supervision work along specialized or technical lines requiring special training' or 'execute[] under only general supervision special assignments and tasks,' (4) be engaged in activities meeting the test for the exemption at least 50 percent of the time,[5] and (5) earn twice the state's minimum wage."[6] (*Eicher v. Advanced Business Integrators, Inc.* (2007) 151 Cal.App.4th 1363, 1371-1372.) "[E]ach of the five elements must be satisfied to find the employee exempt as an administrative employee." (*Id.* at p. 1372; see Cal. Code Regs., tit. 8, § 11011.)

b. *Levy raised a triable issue of material fact whether she spent more than 50 percent of her time on exempt duties*

In its motion for summary judgment AFI asserted Levy met all five criteria to qualify as an administrative exempt employee: According to AFI's 2001 written announcement of Levy's promotion to editorial director, Levy "was responsible for setting the overall tone and style of all AFI editorial content" and editing all text published on AFI's Website in collaboration with the on-line staff. Levy herself testified in the *Davis* case that, as editorial director, she was responsible for "the writing of, the editing of, the gathering of the information, all the text, all the content." Although Levy did not write the articles—they were submitted to her—she was responsible for

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salary equivalent to no less than two (2) times the state minimum wage for full-time employment. Full-time employment is defined in California Labor Code section 515(c) as 40 hours per week."

5 See Labor Code section 515, subdivision (e) (["[f]or the purposes of this section 'primarily' means more than one-half of the employee's worktime"]; *Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal.4th 785, 798, fn. 4 [employee must spend 50 percent or more of his or her work time engaged in exempt activity in order to be exempt from overtime under California law]).

6 Although the IWS was defunded effective July 1, 2004, its wage orders remain in effect. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1102; *Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, 434, fn. 2.)

synthesizing all the material and putting it together in publication form. According to AFI, Levy enjoyed an enormous amount of discretion in her editorial responsibilities. AFI also established, through undisputed evidence, that Levy's salary was more than twice the minimum wage.

In support of its argument that Levy is an exempt employee as a matter of law, AFI points to *Shaw v. Prentice Hall Computer Publishing* (7th Cir. 1998) 151 F.3d 640 (*Shaw*), a federal appellate decision affirming the district court's findings, following a bench trial, that an employee who worked as a production editor for a publishing company fell within the Fair Labor and Standards Act's (FLSA's) administrative exemption (see 29 C.F.R. § 541.201 et seq.).[7] According to the evidence presented at the trial in *Shaw*, the plaintiff/employee's position as production editor involved two parts, an editorial component and a project management component. As an editor, the plaintiff/employee reviewed and edited the company's publications for clarity and readability as well as for grammar, word choice and spelling. As a project manager, the plaintiff/employee delegated work to copy editors and proofreaders and set and monitored deadlines so that the publication would be completed in accord with the schedule set by the managing editor. Emphasizing the plaintiff/employee's role as project manager, the district court found Shaw's duties were directly related to the company's major operations. The appellate court affirmed, concluding substantial evidence supported the district court's findings. (See *Shaw*, at pp. 643-645.)

Although *Shaw*, *supra*, 151 F.3d 640, is factually similar to the instant case in many respects, it does not justify the court's conclusion Levy is an exempt employee as a matter of law. In her opposition papers, Levy described her duties far differently than AFI had: Despite the "lofty" sounding title of editorial director, according to Levy, her

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7 See *Eicher v. Advaned Business Integrators, Inc., supra*, 151 Cal.App.4th at page 1372, footnote 4 ("California courts regularly look to federal authorities for guidance in determining whether an employee is exempt, keeping in mind that state statutes and regulations, through different wording, may provide greater protection to workers in some instances").

job was actually nothing more than a glorified copy editor. (See *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 802 ["if hours worked [on exempt activities] were determined through an employer's job description, then the employer could make an employee exempt from overtime laws solely by fashioning an idealized job description that had little basis in reality"].) In her declaration Levy stated "approximately 85 percent of her time" was spent "proofreading and copy-editing documents to ensure they conformed [to] the AFI's style guide." Unlike the project manager in *Shaw*, she declared, she had no discretion to choose assignments or set deadlines, no supervisorial responsibilities and no role in deciding substantive content.

AFI insists Levy's testimony characterizing herself, in effect, as a titled proofreader does not defeat summary judgment because work that is "directly and closely related" to exempt work also falls within the exemption. (See Cal. Code Regs., tit. 8, § 11010, subd. (2)(f) ["The activities constituting exempt work and non-exempt work shall be construed in the same manner" as they are under the FLSA and "shall include . . . all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions."].) If Levy had other, significant responsibilities that related directly to the organization's management or the general business operations, as AFI contends, the fact that her position included nondiscretionary proofreading functions might not be a bar to summary judgment.[8] However, Levy's declaration denies she had any such responsibilities, and nothing in her prior testimony is directly in conflict with this characterization.[9] Accordingly, on this disputed factual

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8 AFI provided little evidence as to the nature of its general business operations to support its claim Levy's duties were directly related to those responsibilities.

9 Although AFI argues Levy's description of her job duties should be disregarded because it contradicts her testimony in the *Davis* case, that testimony and her declaration are not in conflict. In the *Davis* case Levy testified she "oversaw" the production of editorial content, meaning that she was responsible for the "writing, editing of, fathering the information, all the text, all the content." Later, she explained she was not involved in determining content and had no supervisorial authority. She did not discuss in her deposition testimony (presumably because it was not an issue in the *Davis* case) the

record, the actual nature of Levy's position and the determination whether she is an exempt employee is one properly left to the factfinder at trial. (See *Dalheim v. KDFW-TV* (5th Cir. 1990*)* 918 F.2d 1220, 1226 [the inquiry into exempt status under FLSA "remains intensely fact bound and case specific"].) At this stage, Levy has raised a sufficient issue of material fact to preclude summary judgment.[10]

c. *Fourth cause of action for meal and rest periods*

Every employer "shall provide" nonexempt employees with a 10 minute rest period for every four hours worked and a 30 minute meal period for every six hours worked. (Lab. Code, §§ 226.7, subd. (a), 512, subd. (a); see also Cal. Code Regs., tit. 8, § 11011, subds. 11 & 12.) "If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the [IWC], the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided." (Lab. Code, § 226.7, subd. (b); Cal. Code Regs., tit 8, § 11010, subd. 11(D) [meal periods] &12(B) [rest periods]; see generally *Murphy v. Kenneth Cole Productions, Inc.*, (2007) 40 Cal.4th 1094, 1113-1114 ["[a]n employee forced to forgo his or her meal period . . . has been deprived of the right to be free of the employer's control during the meal period"].)

In her complaint Levy alleged she was never informed about rest and meal breaks and did not always take them because she felt compelled to complete her assigned tasks. The trial court ruled Levy's rest-and-meal breaks claims, like her overtime wage claim,

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amount of time she spent on the tasks comprising her position. Thus, this is not a situation in which Levy is using her declaration to create a triable issue of fact by contradicting her own discovery responses in this lawsuit (cf. *Shin v. Ahn* (2007) 42 Cal.4th 482, 500, fn. 12 ["a party cannot create an issue of fact by a declaration which contradicts his prior discovery responses"]). Rather, she appropriately provided in her declaration a more complete explanation of her duties than the general description given in the *Davis* lawsuit.

10 In light of our holding triable issues of fact remain in connection with Levy's wage-and-hour claims, the unfair competition claim (Bus. & Prof. Code, § 17200), which is predicated on those alleged wage-and-hour violations, also survives.

failed because she was an exempt administrative employee. Citing Levy's deposition testimony acknowledging she, in fact, took some breaks when she needed them, including one-hour lunch breaks, AFI argues, even if Levy were not an exempt employee, this claim fails as a matter of law. Relying on *Brown v. Federal Express Corp.* (C.D. Cal. 2008) 249 F.R.D. 580, 585 and *White v. Starbucks Corp.* (N.D. Cal. 2007) 497 F.Supp.2d 1080 1088, AFI insists its only duty as the employer was to allow rest and meal breaks, not to ensure the employee actually took them.

The proper interpretation of California's statutes and regulations governing an employer's duties to provide meal and rest breaks to hourly workers is currently before the California Supreme Court. (See *Brinker Restaurant Corp. v. Superior Court* (*Hohmbaum*), review granted Oct. 22, 2008, S166350; *Brinkley v. Public Storage,* review granted Jan. 14, 2009, S168806.) The Supreme Court's decision, of course, will control the ultimate resolution of Levy's claim. In the interim, however, particularly since we are returning the case to the superior court for trial of other wage-and-hour claims, we adopt the analysis of our colleagues from the Third District in *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949 (*Cicairos*), which held an employer's obligation under the Labor Code and IWC wage orders is to do more than simply provide rest breaks in theory; it must also permit them as a practical matter. That is, if the employer pressures employees to fulfill other work requirements without correspondingly ensuring compliance with meal and rest period requirements, such behavior violates the Labor Code and corresponding wage orders. (See *Cicairos*, at p. 963 [when employer aware that employee truck drivers were not taking breaks in order to comply with employer's scheduling and did nothing to ensure drivers could take the mandated rest breaks, employer liable for failure to provide off-duty time].)

Although Levy testified that AFI did not affirmatively prevent her from taking breaks, she also explained she was not advised she could take breaks and her work schedule did not always permit it. On this factual record, and in light of our holding that triable issues of material fact exist concerning whether Levy is an administratively exempt employee, summary adjudication of this claim in favor of AFI was error.

5. *The Trial Court Did Not Err in Concluding Levy Could Not Prove Her Claim for Additional Wages*

In her eighth cause of action Levy alleged she had been awarded a 3.5 percent merit pay increase in October 2005, retroactive to July 1, 2005, increasing her annual salary from $61,689.11 to $63,848.23. Levy also alleged AFI's failure to pay her wages in accordance with that merit increase was willful, entitling her not only to the wages improperly withheld, but also to additional penalties. (See Lab. Code, § 203, subd. (a) ["[i]f an employer willfully fails to pay [wages due], without abatement or reduction, in accordance with Sections 201, 201.3, 201.5, 202, and 205.5 . . . the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action is therefor commenced; but the wages shall not continue for more than 30 days"].)

In its motion AFI established Levy was eligible for one merit salary increase in 2005. Levy received a standard 3.5 percent increase in July 2005 based on her June 2005 performance review, increasing her annual salary at that time from $59,603.00 to $61,689.11. In October 2005 a payroll advise form to process a 3.5 percent increase was completed in the mistaken belief Levy had not yet received her 3.5 percent increase awarded in July. When AFI discovered Levy had received her July 2005 merit increase, it did not process the October 2005 payroll advise form, noting on the face of the form "review already done." AFI intended to increase Levy's salary by the standard 3.5 percent in 2005, not by 7 percent.

In her declaration in opposition to the motion, Levy testified AFI had notified her in writing in October 2005 she would receive a 3.5 percent merit increase retroactive to July 1, 2005, increasing her annual salary from $61,689.11 to $63,848.23. Later, after her termination, an AFI employee informed one of Levy's prospective employers Levy had made $63,848.23 a year (a number that would have only been correct if it included the second 3.5 percent increase).

None of Levy's evidence conflicts with AFI's proof its policy was to afford one merit increase per year and that AFI's notification of a second 3.5 percent increase in

October 2005 was a clerical error. Because Levy failed to raise a triable issue of material fact that any wages were actually "due" her (Lab. Code, § 201), the trial court properly adjudicated this claim in favor of AFI as a matter of law.

DISPOSITION

The judgment is reversed. On remand the trial court shall enter a new order denying AFI's motion for summary judgment, denying its alternative motion for summary adjudication as to Levy's second, third, fourth and seventh causes of action relating to wage and hour violations and Business and Professions Code section 17200 and granting AFI's alternative motion for summary adjudication as to Levy's first, fifth, sixth, eighth and ninth causes of action. The court shall conduct further proceedings not inconsistent with this opinion. Each party is to bear her and its own costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

JACKSON, J.